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BRIEF FOR APPELLANT

Sir:

This is a Brief on Appellants' Appeal from the Examiner's Final Rejection concerning the above-identified application.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our Deposit Account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; 37 C.F.R. §1.136.

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Unilever Bestfoods, North America, Division of Conopco, Inc., a corporation of the State of New York.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1-18 and 21-22, the pending claims in the application. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

No amendment was filed after the Final Rejection. A Reply under 37 CFR §1.116 was filed on 1 March 2007. The Reply was entered by the Examiner for purposes of this Appeal.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

The inventions set forth in the claims on appeal are directed to a beverage precursor for making a beverage, and a beverage composition made from the beverage precursor. The beverage precursor can have tea leaf, ground coffee, coffee or tea particulates or a mixture thereof. Furthermore, the beverage precursor should comprise an aroma compound additive that does not originate from the infusible or water soluble material actually in the precursor. The aroma compound is an additive.

By the presently claimed invention, as set forth in independent claim 1, described is a superior beverage precursor having an aroma compound additive. Claims dependent therefrom characterize the precursor by defining,

for example, the amount of water infusible or soluble material used, the type of infusible material, the type of aroma compound additive and the type of packaging for the precursor. Independent claim 10 is directed to a beverage composition made from the beverage precursor of claim 1.

As can be understood in the Example of page 9, the claimed precursor results in an excellent tasting beverage composition.

In the Specification, the portion from pages 1-2 is background. The phraseology used in claims 1 and 10 may be found, for example, on page 3 of the specification as originally filed. Beginning at page 9, the working example illustrates the unexpected and superior results obtained when making the compositions of this invention.

VI. GROUNDS OF THE REJECTION TO BE REVIEWED ON APPEAL

The issues raised in this appeal are primarily ones of fact and of the type normally encountered in connection with rejections made under 35 USC §112,

paragraph 2, 35 USC §102 and 35 USC § 103. In particular, the issues are as follows:

I. Would one of ordinary skill in the art, upon reading claims 21 and 22 find that the same are indefinite under 35 USC §112, paragraph 2;

II. Would one of ordinary skill in the art upon reading EP 560 609 find that the inventions of claims 1-3, 10-12, 21 and 22 lack novelty under 35 USC §102(b);

III. Would one of ordinary skill in the art upon reading DE 19919711 find that the inventions of claims 1-18, 21 and 22 are obvious under 35 USC §103;

IV. Would one of ordinary skill in the art upon reading EP 560 609, Stoeckli et al., U.S. Patent No. 4,496,596, EP 011 324, EP 001 460 or Soughan, U.S. Patent No. 5,932,260 find that the inventions of claims 1-3, 10-12, 21 and 22 are obvious under 35 USC §103;

V. Would one of ordinary skill in the art upon reading Johnson et al., U.S. Patent No. 4,076,847 find that the inventions of claims 1-18, 21 and 22 are obvious under 35 USC §103?

VII. ARGUMENT

I. Rejection Under 35 USC §112

The Examiner has maintained the rejection of claims 21 and 22 under 35 USC §112, paragraph 2 and alleges that the same are indefinite for failing to particularly point out the distinctly claimed subject matter which Appellants regard as the invention.

The Examiner maintains and believes that claims 21 and 22 are indefinite since it is not clear what is meant by the aroma compound additive being carried. Appellants wish to point out that claims 21 and 22, as presented, are clear and filed consistent with 35 USC §112, Second Paragraph. This is true because as set forth in the specification, aroma compounds are carried by carrier compounds and then mixed with or sprayed onto the infusible or water soluble material, or both (Please see page 1 of the Specification). Moreover, the combined composition of aroma compound and carrier compound is identified as an aromatizing composition which may be subjected to infusions with solvent, like water, to yield a more desirable tasting beverage. Thus, the aroma compounds that are carried and sprayed onto or mixed with the infusible or water soluble material become part of the beverage product which is made by using a solvent like water.

In view of the above, it is clear from the specification what is meant by carried aroma compounds. In view of this, Appellants respectfully request that the

rejection made under 35 USC §112, second paragraph be withdrawn and rendered moot.

II. Rejection Under 35 USC §102

The Examiner has, again, rejected claims 1-3, 10-12, 21 and 22 under 35 USC §102(b) as being anticipated by EP 560 609 (hereinafter, '609). In the rejection, the Examiner maintains, in summary, that the claims are rejected for the reasons already set forth in the last Office Action and that the '609 reference discloses the use of soluble coffee powder carrying aroma additive. In this regard, the Examiner believes that two grams of soluble coffee containing the aroma additive would be required to make a conventional brewed beverage as called out in the instant claims. In view of this, the Examiner believes that the novelty rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, independent claim 1, as presented, is directed to a beverage precursor comprising infusible or water soluble material and aroma compound additive wherein the amount of infusible or water soluble material present is at a reduced level when compared to conventional product. The beverage composition made from the same, and as defined in independent claim 10, is superior in that when reduced levels of infusible or water soluble material are present in combination with aroma compound additive, the beverage is preferred by consumers when compared to conventional

beverages made from infusible or water-soluble material at typical levels and in the absence of aroma compound additive.

Independent claim 1 is further defined by the dependent claims which claim, among other things, specific amounts of infusible or water soluble material present within the beverage precursor. Independent claim 10 is directed to a beverage composition made from the precursor of claim 1. Independent claim 10 is further defined by the dependent claims which claim, among other things, specific amounts of infusible or water soluble materials employed. Claims 21 and 22 further define the aroma compound additive as one that is carried, e.g., by a component like a carbohydrate or volatile organic carrier as well as the other illustrated examples presented in the specification as originally filed.

In contrast, and as already made of record, the '609 reference is merely directed to a product associated with coffee. There is no teaching whatsoever in the '609 reference that even remotely suggests that less than conventional amounts of infusible or water soluble materials selected may be used in combination with aroma compound additive that is carried to make a superior precursor or beverage as claimed in the present inventions. The '609 reference is merely directed to a coffee flavor and coffee aroma source of micromilled coffee that can be used in coffee flavored food products like ice cream, candy, chewing gum and fillings. No teaching whatsoever in the '609 reference, again, even remotely describes all of the important and critical limitations set forth in the presently claimed inventions. Therefore, Appellants request that the novelty rejection be withdrawn and rendered moot.

III. Rejection Under 35 USC §103

The Examiner has, again, rejected claims 1-18, 21 and 22 under 35 USC §103 as being unpatentable over DE 19919711 (hereinafter, '711). In the rejection, the Examiner mentions, in summary, that the rejection stands for the reasons set forth in the last Office Action. Furthermore, the Examiner maintains that the '711 reference discloses the carrying of coffee and aroma additive in packaging. The Examiner admits that the '711 reference does not disclose particular amounts of infusible water soluble material but believes that such limitations would have been obvious to one of ordinary skill in the art. In view of this, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, independent claim 1, as presented, is directed to a beverage precursor comprising:

- a) an infusible or water soluble material selected from the group consisting of tea leaf, ground coffee, coffee or tea particulates, cocoa, herbs and a mixture thereof; and
- b) aroma compound additive

wherein the infusible or water soluble material is present at a level that is from about 0.5 to about 25.0% by weight less than a conventional amount used for about a six to about eight ounce serving and the aroma compound is an additive and not originating from the infusible or water soluble material present,

the conventional amount being defined as 1.90-2.50 grams for tea leaf, 3.5-6.5 grams for ground coffee, 1.4-2.4 grams for coffee particulates, 0.30-0.90 grams for tea particulates, 1.0-2.5 grams for herb and 1.85-4.5 grams for cocoa.

Independent claim 1 is further defined by the dependent claims, which claim, among other things, the amount of water soluble material present, that the infusible material is tea leaf, that the tea leaf is decaffeinated tea leaf, the source of the aroma compound, and how the beverage precursor may be packed.

Independent claim 10 is directed to a beverage made with the beverage precursor described in independent claim 1. Independent claim 10 is further defined by dependent claims which claim, among other things, the amount of water soluble material present, the type of infusible material, the source of aroma compound, and how the beverage precursor may be packed. Again, and as already made of record, previously presented claims 21 and 22 define the aroma compound as an additive which is carried.

In contrast, the '711 abstract, as made of record, merely describes aromatization of tea and coffee with aromas. The abstract further states that the invention makes it possible for the consumer to add aroma to basic tea or coffee. Unlike the present invention, beverage precursor is prepared and ready for the consumer to use wherein the consumer needs no additional steps to prepare the desired beverage. Moreover there is no teaching whatsoever in the '711 reference that even remotely suggests that a reduced level of infusible or water soluble material may be used in combination with aroma compound additive in order to result in a superior precursor or better tasting beverage

composition. Clearly, no teaching whatsoever in the '711 reference even remotely defines what constitutes less than a conventional amount of infusible or water soluble material as set forth in the invention as now presented. In view of this, all of the important and critical limitations set forth in the presently claimed inventions are not found in the '711 reference and a *prima facie* case of obviousness has not been established. Therefore, Appellants request that the obviousness rejection based on the same be withdrawn and rendered moot.

IV. Rejection Under 35 USC §103

The Examiner has, again, rejected claims 1-3, 10-12, 21 and 22 under 35 USC §103 as being unpatentable over EP 560609 (hereinafter, '609), Stoeckli et al., U.S. Patent No. 4,496,596 (hereinafter, '596), EP 011324 (hereinafter, '324), EP 001460, or Soughan, U.S. Patent No. 5,932,260 (hereinafter, '260). In the rejection, the Examiner maintains the previous rejection and believes, in summary, that the references disclose a mixture comprising coffee with an aroma additive where the additive is carried on coffee itself. In view of this, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, independent claim 1 is directed to a beverage precursor comprising infusible or water soluble material and aroma compound additive wherein the amount of infusible or water soluble material present is at a

reduced level when compared to conventional product. The beverage composition made from the same, as defined in independent claim 10, is superior in that when reduced levels of infusible or water soluble material are present in combination with aroma compound additive, the beverage is preferred by consumers when compared to conventional beverages made from infusible or water soluble material at typical levels and in the absence of aroma compound additive.

Independent claim 1 is further defined by the dependent claims which claim, among other things, specific amounts of infusible or water soluble material present within the beverage precursor. Independent claim 10 is further defined by the dependent claims which claim, among other things, specific amounts of infusible or water soluble material when compared to the conventional amount used to make a particular beverage composition.

Furthermore, independent claims 1 and 10 are further defined by claims 21 and 22 such that the aroma compound additive is one which is subjected to a carrier and carried.

In contrast, the '609, '596, '324, '460, and '260 references are merely directed to products associated with coffee. There is no teaching whatsoever in the references relied on by the Examiner that even remotely suggests that less than conventional amounts of infusible or water soluble materials selected may be used in combination with aroma compound additive to make a superior precursor or beverage as claimed herein. In view of this, all of the important and critical limitations set forth in the presently claimed invention are not found in the references relied on by the Examiner, in any combination. Therefore, the

obviousness rejection relying on the same should be withdrawn and rendered moot.

V. Rejection Under 35 USC § 103

The Examiner has rejected claims 1-18, 21 and 22 under 35 USC § 103 as being anticipated by Johnson et al., U.S. Patent No. 4,076,847 (hereinafter, '847). In the rejection, the Examiner maintains, in summary, that the claims are rejected for the reasons of record and that the '847 reference discloses coffee solid carrying aroma additive. In view of this, the Examiner maintains that the rejection made with respect to the '847 reference is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a beverage precursor that comprises insoluble or water soluble material an aroma compound additive wherein the infusible or water soluble material is present at a level that is less than a conventional amount. Moreover, Appellants have claimed a superior beverage composition made from the precursor of claim 1 wherein beverage composition is made with less infusible or water soluble material yet in combination with aroma compound additive. The resulting beverage composition is preferred by consumers when compared to conventional beverage products made with the standard level of infusible or water soluble material.

In contrast, the '847 reference, again, merely describes beverage compositions that have flavor granules coated on the outer surface with a powdered beverage such as tea, cocoa or coffee. Such granules are preferably prepared by coating the flavor granules in a rotating granulator. Nowhere in the '847 reference is it even remotely taught or suggested to make a beverage precursor or a beverage composition with less infusible or water soluble material than conventional products and in combination with an aroma compound additive.

In view of this, it is clear that all the important and critical limitations set forth in the presently claimed invention are not, even remotely found in the '847 reference. Therefore, Appellants respectfully request that the obviousness rejection be withdrawn and rendered moot.

VIII. CONCLUSION

Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection of claims 1-18, 21 and 22 under 35 U.S.C. §103.

Respectfully submitted,



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IX. CLAIMS APPENDIX

1. (previously presented) A beverage precursor comprising:

- (a) an infusible or water soluble material selected from the group consisting of tea leaf, ground coffee, coffee or tea particulates, cocoa, herbs and a mixture thereof; and
- (b) aroma compound additive

wherein the infusible or water soluble material is present at a level that is from about 0.5 to about 25.0% by weight less than a conventional amount used for about a six to about eight ounce serving and the aroma compound is an additive and not originating from the infusible or water soluble material present, the conventional amount being defined as 1.90-2.50 grams for tea leaf, 3.5-6.5 grams for ground coffee, 1.4-2.4 grams for coffee particulates, 0.30-0.90 grams for tea particulates, 1.0-2.5 grams for herb and 1.85-4.5 grams for cocoa.

2. (original) The beverage precursor according to claim 1 wherein the infusible or water soluble material is present at a level that is from about 5.0 to about 20.0% by weight less than a conventional amount used for about a six to about eight ounce serving.

3. (original) The beverage precursor according to claim 1 wherein the infusible or water soluble material is present at a level that is from about 8.0 to about 15.0% by weight less than a conventional amount used for about a six to a eight ounce serving.
4. (original) The beverage precursor according to claim 1 wherein infusible material is present and the infusible material is tea leaf.
5. (original) The beverage precursor according to claim 4 wherein the tea leaf is decaffeinated tea leaf.
6. (original) The beverage precursor according to claim 5 wherein the aroma compound is recovered from tea leaves, tea leaf before the tea leaf is decaffeinated, natural aroma compound or artificial aroma compound.
7. (original) The beverage precursor according to claim 4 wherein the aroma compound is natural aroma compound or artificial aroma compound.
8. (original) The beverage precursor according to claim 6 wherein the beverage precursor is packed in a tea bag.

9. (original) The beverage precursor according to claim 7 wherein the beverage precursor is packed in a tea bag.

10. (previously presented) A beverage composition, the beverage composition made by contacting an aqueous solution and a beverage precursor comprising:

- (a) an infusible or water soluble material selected from the group consisting of tea leaf, ground coffee, coffee or tea particulates, cocoa, herbs and a mixture thereof; and
- (b) aroma compound additive

wherein the infusible or water soluble material is present at a level that is from about 0.5 to about 25.0% by weight less than a conventional amount used for about a six to about eight ounce serving and the aroma compound is an additive and not originating from the infusible or water soluble material present, the conventional amount being defined as 1.90-2.50 grams for tea leaf, 3.5-6.5 grams for ground coffee, 1.4-2.4 grams for coffee particulates, 0.30-0.90 grams for tea particulates, 1.0-2.5 grams for herb and 1.85-4.5 grams for cocoa.

11. (original) The beverage composition according to claim 10 wherein the infusible or water soluble material is present at a level that is from about 5.0 to about 20.0% by weight less than a conventional amount used for about a six to about eight ounce serving.

12. (original) The beverage composition according to claim 10 wherein the infusible or water soluble material is present at a level that is from about 8.0 to about 15.0% by weight less than a conventional amount used for about a six to a eight ounce serving.

13. (original) The beverage composition according to claim 10 wherein infusible material is present and the infusible material is tea leaf.

14. (original) The beverage composition according to claim 13 wherein the tea leaf is decaffeinated tea leaf.

15. (original) The beverage composition according to claim 14 wherein the aroma compound is recovered from tea leaves, tea leaf before the tea leaf is decaffeinated, natural aroma compound or artificial aroma compound.

16. (original) The beverage composition according to claim 13 wherein the aroma compound is natural aroma compound or artificial aroma compound.

17. (original) The beverage composition according to claim 15 wherein the beverage precursor is packed in a tea bag.

18. (original) The beverage composition according to claim 16 wherein the beverage precursor is packed in a tea bag.

19. (cancelled)

20. (cancelled)

21. (previously presented) The beverage precursor according to claim 1 wherein the aroma compound additive is carried.

22. (previously presented) The beverage composition according to claim 10 wherein the aroma compound additive is carried.

X. EVIDENCE APPENDIX

No evidence pursuant to §§ 1.130, 1.131 and/or 1.132 is/are submitted herewith.

XI. RELATED PROCEEDINGS APPENDIX

No decisions rendered by a Court or the Board have been made; therefore, no such decisions are submitted herewith.